Nos. 09-1454 & 09-1478

In the Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF BATTERED WOMEN'S RESOURCE CENTER *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. There Is A Significant Risk That The State Will Unreasonably Invade The Rights Of Abuse Victims, Particularly In Cases Involving Domestic Violence 13

A. State Intervention Often Causes Greater Harm 13

B. Due To Misconceptions And Biases, State Systems Inappropriately Punish And Re-Victimize Non-Offending Battered Mothers 17

C. Child Protective Services Agents Have Overstepped Constitutional Bounds In Cases Involving Domestic Violence 20

II. Given The Risk Of Unreasonable State Intrusions, Victims And Witnesses Of Abuse Are Entitled To Full Fourth Amendment Protection 22

TABLE OF CONTENTS

Page

A. The Fourth Amendment's Concerns With Preventing Arbitrary Government Intrusions Are Particularly Relevant In Cases Involving Domestic Violence. 22

B. Nothing In The Court's Jurisprudence Suggests That Witnesses And Victims Are Entitled To Less Protection Under The Fourth Amendment. 24

III. Relaxing Fourth Amendment Standards For Child Protection Investigations Will Diminish Fourth Amendment Rights In Domestic Violence Investigations. 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

Brigham v. Stuart,
547 U.S. 398 (2006) 30

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443 U.S. 47 (1979) 23

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387 U.S. 523 (1967) 23, 24

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442 U.S. 200 (1979) 23

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460 U.S. 491 (1983) 24

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547 U.S. 103 (2006) 28

Illinois v. Lidster,
540 U.S. 419 (2004) 25, 26

Indianapolis v. Edmond,
531 U.S. 32 (2000) 11

Katz v. United States,
389 U.S. 347 (1967) 22

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496 U.S. 444 (1990) 26

Nicholson v. Scoppetta,
3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004) 20

Nicholson v. Williams,
203 F. Supp. 2d 153 (E.D.N.Y. 2002) ..... *passim*

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464 F.3d 916 (9th Cir. 2006) 30

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162 Ariz. 431, P.2d 257 (Ariz. 1989) 29

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133 F.3d 189 (2d Cir. 1998) 29

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428 U.S. 543 (1976) 26

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400 U.S. 309 (1971) 30

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INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Battered Women's Resource Center; the California Partnership to End Domestic Violence; Domestic Violence Report; Family Violence Law Center; inMotion, Inc.; Lakeshore Legal Aid; Legal Services-NYC; Life Span; My Sisters' Place, Inc.; National Advocates for Pregnant Women; the National Coalition Against Domestic Violence; the New York Legal Assistance Group; Sharwline Nicholson; and the University of Baltimore Family Law Clinic submit this *amici curiae* brief in support of Respondent Sarah Greene. [1]

Battered Women's Resource Center

Founded in 2000, the Battered Women's Resource Center ("BWRC") is a New York based nonprofit that works to empower survivors of domestic violence. BWRC's Voices of Women Organizing Project ("VOW"), brings together survivors of domestic violence to improve the systems that abused women and their children turn to for safety and justice. VOW members organize to promote long-term systemic change by documenting institutional failures, testifying at hearings, creating position papers, and meeting with local and state officials. BWRC's

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[1] The parties have consented to the filing of *amicus* briefs in support of either party or of neither party. *Amici* confirm that (i) no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief, (ii) no counsel for any party authored any part of this brief, and (iii) no party or counsel contributed money intended to fund the preparation or submission of this brief.

Rights of Children Campaign works to support child safety and freedom from intrusive investigations by the child welfare agency by utilizing a community-organizing approach in which survivors of domestic violence organize and advocate for improvements to the system.

California Partnership To End Domestic Violence

The California Partnership to End Domestic Violence ("CPEDV") is a statewide membership-based coalition of over 175 California organizations, agencies, and individuals working to end domestic violence at local, state, and national levels. CPEDV has a 30-year history of providing a united voice for California's domestic violence advocates and the survivors they serve. Aware of the challenges and injustices that battered women and children often face when interacting with the agencies tasked to protect them, CPEDV is deeply concerned with the potential dilution of the Fourth Amendment rights of victims, regardless of where the questioning takes place. It is based on these realities that CPEDV's membership, through their united voice, urge this Court to consider the far-reaching implications of this case, and to protect the constitutional rights of abuse victims subject to custodial interrogation.

Domestic Violence Report

Domestic Violence Report ("DVR") is a multidisciplinary newsletter that is distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, police, probation officers, and oth-

ers interested in ending domestic violence. Since October of 1995, it has published every two months. The newsletter covers all aspects of domestic violence, with particular focus on promoting the safety of domestic violence victims and children. The newsletter editors, contributors, and advisory board work with and train policymakers throughout the nation and assist them in drafting protocols and appropriate responses for domestic violence.

Family Violence Law Center

Family Violence Law Center ("FVLC") has been working to end domestic violence in Alameda County, California since 1978. FVLC operates an integrated service model that includes both protection initiatives for people currently experiencing abuse—including legal services, advocacy, and emergency housing and relocation services—and prevention initiatives to eliminate future abuse. Last year, FVLC provided life-saving services to more than 3,000 survivors and their children, helping them achieve safety and independence and supporting them as they heal. In addition, FVLC works to change institutional barriers for survivors within the legal, health, education, and criminal justice systems.

inMotion, Inc.

Since 1993, inMotion has helped thousands of women free themselves from abusive relationships, stay in their homes, and win the financial support to which they—and their children—are legally entitled. Its mission is to make a real and lasting difference in the lives of low-income, under-served, and abused

women by offering them legal services designed to foster equal access to justice and an empowered approach to life. InMotion fulfills its mission by providing free, quality services, primarily in the areas of matrimonial, family, and immigration law, in a way that acknowledges mutual respect, encourages personal growth, and nurtures individual and collective strength. Informed by this work, inMotion promotes policies that make our society more responsive to the legal issues confronting the women it serves.

Lakeshore Legal Aid

Founded in 1969, Lakeshore Legal Aid (Lakeshore) is a nonprofit legal aid program that provides free, holistic legal services to the poor and vulnerable in Michigan's lower peninsula. Lakeshore's service area is diverse, ranging from the economically depressed city of Detroit to Michigan's rural "thumb" region. Recognized as a pioneer in addressing domestic and sexual violence, Lakeshore has litigated thousands of complex civil cases on behalf of domestic violence and sexual assault clients in matters of child protection, custody, visitation, and divorce. In 2010, Lakeshore received the trailblazer award from the Michigan Coalition Against Domestic and Sexual Violence for the agency's innovative, collaborative approach to meeting the needs of domestic violence and sexual assault survivors in Michigan.

Legal Services-NYC

Legal Services-NYC has provided free civil legal services to poor people in all boroughs of New York City for over 40 years. In addition to representing individual clients, it provides continuing legal educa-

tion and consultation to the public interest law community and participates in advocacy organizations, such as the Lawyers' Committee Against Domestic Violence. Legal Services-NYC has a long history of providing high quality legal representation to victims of domestic violence in cases involving orders of protection, child custody, visitation, child support and divorce. Legal Services-NYC has an equally long history in representing poor parents in child protective proceedings. Between its citywide Keeping Families Together program and its Brooklyn Family Defense Project, Legal Services-NYC assists over 1100 families a year, including nearly half the parents in Brooklyn charged with neglect or abuse. Legal Services-NYC lawyers and advocates also are involved in numerous policy and advocacy efforts directed at improving justice for parents and children in the Family Court and child welfare system.

Life Span

Life Span provides comprehensive legal and social services to victims of domestic and sexual violence and their children in Chicago and its suburbs. In operation since 1978, the lawyers, counselors, and advocates at Life Span help 3,500 clients annually. The agency's lawyers specialize in representing victims in complicated family law matters, including custody and visitation, divorce, and orders of protection. Life Span assists hundreds of battered women and their children each year who have come under the jurisdiction of the Illinois Department of Children and Family Services because they are victims of domestic violence. Life Span also engages in systemic advocacy and policy work with a goal of im-

proving the response of the legal system to victims of domestic and sexual violence.

My Sisters' Place, Inc.

A nonprofit organization formed in 1978, My Sisters' Place is the leading resource in Westchester County, New York, and the surrounding regions in the field of domestic violence and human trafficking programming, advocacy, and legal services. Throughout its history, My Sisters' Place has offered a holistic approach to the many and varied needs of domestic violence victims, including safety, supportive healing services, economic opportunity, and housing. Its programs include two residential shelters, individual counseling and advocacy, children's programs, support groups, a legal center, life skills training, school-based domestic violence prevention education, and outreach programs. Founded in 1997, the full-service Legal Center of My Sisters' Place provides legal advice, counsel, and representation to domestic violence victims in family law matters and in the areas of immigration, employment, and government benefits.

National Advocates For Pregnant Women

National Advocates for Pregnant Women ("NAPW") is a nonprofit organization that works to ensure the human and civil rights, health, and dignity of pregnant and parenting women while protecting children from counterproductive and misguided state policies. NAPW advocates for reproductive and family justice, including the right to carry a pregnancy to term, access to culturally-appropriate and

evidence-based medical care, and the rights of parents and children to family integrity undisrupted by inappropriate state action. NAPW helped represent plaintiffs in *Ferguson v. City of Charleston* and joins this case as amicus because of the harm to parents, children, and family life if Fourth Amendment protections are denied in the guise of protecting children.

National Coalition Against Domestic Violence

The National Coalition Against Domestic Violence ("NCADV"), founded in 1978 and incorporated in the state of Oregon, is a national nonprofit that provides general information, referrals, and technical assistance to domestic violence service providers and serves as the primary representative of battered women and their children in the public policy arena. NCADV is extremely concerned about the potential relaxing of Fourth Amendment rights of a victim, regardless of where that victim is questioned. Through its work on national domestic violence advocacy, NCADV knows that many battered women and their children face injustices as a result of policies and practices carried out by agencies that are supposed to help and protect them. Victims of domestic violence must be afforded their rights during questioning, just as the alleged perpetrator has rights when questioned. If those rights are waived or relaxed for the victims, their personal safety is often comprised.

New York Legal Assistance Group

Founded in 1990, the New York Legal Assistance Group ("NYLAG") is a nonprofit organization dedi-

cated to providing free civil legal services to New York's low income families. In 1994, NYLAG established its Domestic Violence Initiative which provides assistance to victims of domestic violence on a priority basis. In addition to obtaining orders of protection, the Initiative provides victims with legal representation in child protection, custody, visitation, support and matrimonial matters. NYLAG has further demonstrated its commitment to promoting legal services for victims of domestic violence through its Domestic Violence Clinical Center ("DVCC"). The DVCC is an innovative program administered and supervised by NYLAG attorneys, which offers law students the opportunity to learn the substantive and litigation skills necessary to provide exceptional representation to battered women.

Sharwline Nicholson

Sharwline Nicholson is a mother and a domestic violence survivor who has experienced first-hand the devastation child protective services agencies can cause through overly aggressive, unreasonable interventions in cases involving domestic violence. Her experience is discussed in more detail in the argument below. In 1999, after an incident in which Ms. Nicholson was badly beaten by her daughter's father, the New York City Administration for Children's Services ("ACS") removed her eight-year-old son and three-year-old daughter to foster care. They did so even though they had no reason to believe that Ms. Nicholson was neglectful or that the children would be harmed in her care. The children remained in foster care, where they were mistreated, for three

weeks. Ms. Nicholson subsequently became the named plaintiff in the landmark case of *Nicholson v. Williams*, a class action suit which challenged ACS's policy and practice of presumptively removing children from non-offending battered mothers as a violation of their mothers' constitutional rights. The case ultimately established that battered mothers cannot be found guilty of neglect merely because their children have witnessed violence. Following her success, Ms. Nicholson has spoken at domestic violence conferences and colleges and has been active in several organizations in New York City, including the Child Welfare Organizing Project and the Child Welfare Watch.

University Of Baltimore Family Law Clinic

The University of Baltimore Family Law Clinic provides representation for residents of the Baltimore community in a range of family law matters. The Clinic has focused on the needs of women subjected to abuse and their children, representing them in protective order, divorce, custody and child support proceedings and assisting them in understanding and using the criminal sanctions applicable when their partners' actions violate the criminal law. Because of their interactions with the criminal system and child protective services, the Clinic's clients are potentially at risk for the kinds of custodial interrogation involved in *Camreta & Alford v. Greene*.

SUMMARY OF ARGUMENT

The seizure and interrogation of a child or any person believed to have suffered abuse is highly intrusive and can have disastrous consequences for the individual and her family. In arguing that the state should have maximum flexibility in child protection investigations, petitioners unjustifiably assume that state intervention is likely to help children. Yet, in reality, despite the good intentions of child protective services ("CPS") and law enforcement personnel, their intervention in cases of suspected intra-family abuse can put victims at risk of greater danger. The risk that state intervention will damage children and families is particularly acute in cases in which child protection concerns overlap with domestic violence against a parent or guardian.

Allegations of child abuse and neglect frequently arise in families in which domestic violence against a parent or guardian also occurs. In the context of domestic violence, there is a substantial risk that state intrusions on the rights of children and parents will be unreasonable—*i.e.*, they will significantly interfere with rights without serving the state's interest in protecting victims. In domestic violence cases, state intervention may actually endanger the mother and child by prompting the batterer to intensify his violence and increase other forms of coercive control. Moreover, in the context of domestic violence (or suspected domestic violence), the judgment of CPS and law enforcement agents is likely to be clouded by unwarranted beliefs that battered mothers will not protect their children. When dealing with the complex dynamics of domestic violence, poorly trained,

overworked and overzealous CPS and law enforcement agents easily can fail to recognize when state intervention is (or is not) reasonably necessary and appropriate to protect children. For these reasons, the Fourth Amendment's protections against arbitrary state interference with children's and parents' rights are particularly important. To protect these rights, the Fourth Amendment's traditional requirements for a warrant and probable cause provide a necessary check on the discretion of CPS and law enforcement agents.

Given the intrusiveness of CPS/law enforcement investigations of intra-family abuse and the high risk that state interventions will be damaging and ineffective, the Court should decline petitioners' invitation to create a lesser standard of Fourth Amendment protection for suspected child abuse victims. There is no basis in precedent or logic for a ruling that suspected victims or witnesses of crime are entitled to less freedom from governmental intrusions than suspected perpetrators. Undoubtedly, petitioners are correct that the government's interest in protecting children is compelling. However, "the gravity of the threat alone cannot be dispositive of questions concerning what means [state agents] may employ to pursue a given purpose." *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). The Fourth Amendment also requires consideration of the harms the intervention may cause as well as the likelihood that the intervention will serve the state's interest.

Furthermore, if the Court condones the seizure and interrogation of S.G., a suspected child abuse victim, without a warrant, probable cause, parental

consent, or exigent circumstances, it will pave the way for relaxing Fourth Amendment rights in circumstances beyond those of the instant case. That is because, if accepted by this Court, the rationales on which petitioners wrongly rely to justify S.G.'s seizure would apply equally to--and, therefore, could be used to justify--seizures in other factual settings. For example, under petitioners' flawed reasoning, because children may be harmed by witnessing domestic violence, CPS and law enforcement agents would be justified in seizing and interrogating children believed to have been exposed to domestic violence, even when those children have not themselves been abused. By logical extension, in certain circumstances in which adults have reduced expectations of privacy, petitioners' faulty rationales also would justify investigatory seizures of battered mothers without a warrant, probable cause or consent. Such expansions of state powers in circumstances not directly presented by this case are possible if suspected abuse victims are afforded anything less than the full protection of the Fourth Amendment.

ARGUMENT

I. There Is A Significant Risk That The State Will Unreasonably Invade The Rights Of Abuse Victims, Particularly In Cases Involving Domestic Violence.

A. State Intervention Often Causes Greater Harm.

Although the state has an interest in protecting people from violence, the responses of CPS and law enforcement agents, in actuality, often increase violence in the home and put victims in greater danger, thereby thwarting the state's interest in protection. Despite the best intentions of state agents, their involvement in situations of intra-family abuse can harm and re-victimize victims. *See* New York State Judicial Committee on Women in the Courts, *Women in the Courts: A Work in Progress* 26 (2002); Doriane Lambelet Coleman, *Storming The Castle To Save The Children: The Ironic Costs Of A Child Welfare Exception To The Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 417–419 (2005). In many cases of child abuse and neglect, a parent—typically the mother—is a victim of violence by her intimate partner.[2] Evan Stark, *The Battered Mother in the Child*

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[2] There is considerable overlap between child protection and domestic violence cases. Although domestic violence is likely significantly underreported, "even the lowest estimates of its prevalence indicate that domestic violence is more often an issue in child protection cases than is substance abuse, homelessness, mental illness or other comparable problems to which considerably greater resources are devoted." Stark, *The Bat-*

Protective Service Caseload: Developing an Appropriate Response, 23 Women's Rts. L. Rep. 107, 109 (2002) [hereinafter Stark, *The Battered Mother*] ("[d]omestic violence against the mother is a common, and may be the single most common, context for child abuse or neglect."). In such cases, a victim's report of abuse to the state may trigger intensified violence and increase other forms of coercive control, such as intimidation, surveillance, degradation, and isolation of the mother from outside sources of support. Peter G. Jaffe, Nancy K.D. Lemon, & Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability* 29 (2003); National Council of Juvenile & Family Court Judges, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* 66 (1999); Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 228–229 (2007) [hereinafter Stark, *Coercive Control*]; V. Pualani Enos, *Recent Development: Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 Harv. Women's L.J. 229, 243–244 (1996); Deborah Tuerkheimer, *Exigency*, 49 Ariz. L. Rev. 801, 817 (2007). And when the state intervenes—for example, by arresting batterers or issuing orders of protection—in many cases, it fails to protect victims and their children from further violence. *See* Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in Do Arrests and Restraining Orders Work* 214, 218 (Eve S. Buzawa & Carl G. Buzawa

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tered Mother at 111–112; *see also* National Council of Juvenile & Family Court Judges, *supra*, at 9.

eds., 1996); Patricia Tjaden & Nancy Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence* 52 (2000) (reporting study findings that only 7.3% of physical assaults, 7.5% of rapes, and 14.6% of stalking cases involving intimate partners were prosecuted); Charles L. Diviney *et al.*, *Outcomes of Civil Protective Orders: Results From One State*, J. Interpersonal Violence, 2009, at 1209–1221; T.K. Logan *et al.*, *Protective Orders: Questions and Conundrums, Trauma, Violence, and Abuse*, 2006, at 175, 191 (reporting analysis of thirty-two studies finding that about 40% of protective orders were violated); Ann Malecha *et al.*, *Applying for and Dropping a Protection Order: A Study with 150 Women*, Crim. Just. Pol'y Rev., 2003, at 486, 492; David Owens, *West Hartford Man Arrested Three Times on Domestic Violence Charges*, Hartford Courant (June 1, 2010), *available at* http://articles.courant.com/2010/jun/01 (follow "West Hartford Man Arrested Three Times on Domestic Violence Charges" hyperlink).

In addition, the disclosure of violence may prompt state action to remove children from their non-abusive, battered mothers, even where the children have not been directly abused, but have merely witnessed their mother's battering.[3] New York State

[3] The threat that the state will take a battered mother's children if she reports her abuse serves to reinforce the batterers' control by discouraging her from seeking help. This is another means by which the CPS system, ironically, creates greater danger for domestic violence victims and their children. In fact, batterers often threaten to call CPS and have the children removed as a means of exerting control over the mothers. Stark, *Coercive Control* at 251.

Judicial Committee on Women in the Courts, *supra*, at 27; G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89, 91–92 (1999); *see also* discussion *infra* Part I.C. While exposure to domestic violence may cause some children physical, emotional, and behavioral problems, studies show that the vast majority of children who witness such abuse suffer no negative effects.[4] Stark, *The Battered Mother* at 116; *see also Nicholson v. Williams*, 203 F. Supp. 2d 153, 197 (E.D.N.Y. 2002); National Council of Juvenile & Family Court Judges, *supra*, at 10. The removal of children in these situations is especially harmful because the bond between the non-offending parent and her child is crucial to the child's resiliency. *Nicholson*, 203 F. Supp. 2d at 198–199; *see also* American Psychological Association, *Violence and the Family* 124 (1996); Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 104 (2002). Importantly, the removal of children is likely unwarranted because non-abusive battered mothers are, in general, highly capable parents. *See* Stark,

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[4] The degree to which children may be harmed by witnessing domestic violence depends on a variety of factors including the child's age, the level of violence witnessed by the child, other stressors in the child's life and the child's relationship to the victim. *Nicholson*, 203 F. Supp. 2d at 197 (discussing expert testimony). Moreover, when children are harmed by witnessing domestic violence, the harm often does not rise to a level where governmental intervention is justified. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 Hastings L.J. 1, 34 (2001).

The Battered Mother at 112; Weithorn, *supra*, at 33. Thus, in the groundbreaking "Green Book," which was the first systematic effort at a national level to develop guidelines for child protection cases involving domestic violence, the National Council of Juvenile & Family Court Judges recommends that children affected by abuse, neglect, or domestic violence be kept with their non-offending parents whenever possible. National Council of Juvenile & Family Court Judges, *supra*, at 14.

B. Due To Misconceptions And Biases, State Systems Inappropriately Punish And Re-Victimize Non-Offending Battered Mothers.

Scholars, legal practitioners, advocates, and courts have recognized that, instead of providing help and needed support, state systems designed to protect victims of domestic violence frequently punish and re-victimize them. *Nicholson*, 203 F. Supp. at 200–201, 211 (discussing policies and practices that blame victimized mothers and fail to hold abusers accountable); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. Rev. 577, 587–588 (1997); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 17 (1999); Bonnie E. Rabin, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 Alb. L. Rev. 1109, 1110–1111 (1995). Due to inadequate training,

cultural norms that hold mothers primarily responsible for the care of children, institutional biases, and victim stereotypes, "[w]hen domestic violence is identified, punitive labels and interventions are more likely to be applied than in cases involving comparable harms to children where no domestic violence has occurred." Stark, *The Battered Mother* at 110; *see also* Miccio, *supra*, at 116–118 (discussing effects of gender bias on legal system's treatment of battered mothers). Despite evidence that domestic violence victims are likely to be high-functioning and capable parents, battered mothers are generally presumed incapable of protecting themselves or their children. Stark, *The Battered Mother* at 112; *see also* National Council of Juvenile & Family Court Judges, *supra*, at 11.

Presuming that children exposed to domestic violence are at risk of serious harm and that battered mothers will not protect their children, CPS and law enforcement agents often fail to adequately assess the actual risk and, instead, assume that aggressive intervention is necessary. National Council of Juvenile & Family Court Judges, *supra*, at 21–22. In addition to removing children from their non-abusive mothers, the state may leverage its child protective authority to force domestic violence victims to take actions it deems appropriate—such as, cooperation with possibly inappropriate or ineffective service plans, leaving the abuser, obtaining orders of protection, and participating in the prosecution of the batterer.[5] *See, e.g., Nicholson*, 203 F. Supp. 2d at 216

[5] The choices of battered women—for example, to stay with their abusers and to resist state intervention—may seem irra-

(finding that ACS needlessly protracts return of children to non-offending abused mothers "due to pique of the ACS employee or to the employee using bureaucratic power to punish the mother and child until the mother becomes pliant to ACS orders—even though the ACS demands may not be necessary to protect the children."). Laws mandating arrest of batterers and no-drop prosecution policies further deny victims control without necessarily increasing safety. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. St. U. L. Rev. 1, 32–43 (2009); David Hirschel, Eve Buzawa, April Pattavina, & Don Faggiani, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. Crim. L. & Criminology 255, no. 1, 255, 255 (2007). As explained by Professor Deborah Epstein, "[i]n many cases, prosecutors take complete control over the case, functioning as the sole decision-maker and ignoring the victim's voice. . . . Such re-victimization can thwart the survivor's efforts to regain control over

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tional or even pathological if considered without proper understanding of the dilemmas these women face. A battered mother may choose to stay with an abusive partner and to resist state assistance for a variety of rational reasons, including fear of retaliation, fear that the state will take her children away, economic dependence on the abuser, lack of safe alternative housing, risk that an immigrant abuser will be deported, and religious or cultural reasons. National Council of Juvenile & Family Court Judges, *supra*, at 11; Enos, *supra*, at 245–246; Epstein, *supra*, at 17-18. When the state fails to take victims' concerns seriously, and instead forces victims to comply with its plans, the state paradoxically may jeopardize the safety and security of battered mothers and their children.

her life and move past the abusive experience." Epstein, *supra*, at 17. Such paternalistic approaches to domestic violence ignore the ways in which victims make autonomous, rational, and protective choices within the constraints of their circumstances. Goodmark, *supra*, at 27–29; Stark, *The Battered Mother* at 125–126.

C. Child Protective Services Agents Have Overstepped Constitutional Bounds In Cases Involving Domestic Violence.

The case of *amicus curiae* Sharwline Nicholson provides a useful illustration of the danger that CPS will overstep constitutional limits in cases involving domestic violence. *See Nicholson*, 203 F. Supp. at 153; *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004). In that class action litigation, the Eastern District of New York found that the City of New York's Administration for Children's Services ("ACS") engaged in "widespread and unnecessary cruelty" and violated substantive and procedural due process rights by removing children from the care of non-abusive battered mothers on the presumption that the children's exposure to the mother's abuse constituted neglect. 203 F. Supp. 2d at 163, 251. In Ms. Nicholson's personal situation, ACS took her three-year-old daughter and eight-year-old son into state custody following an incident in which Ms. Nicholson was beaten and seriously injured by her daughter's father, Mr. Barnett. *Id.* at 169. This was the first and only time that Ms. Nicholson had been beaten by Mr. Barnett, who lived in another state. *Id.* Even though the ACS case-

worker knew that he did not have legal authorization to keep the children in custody, he testified "that he was hoping Ms. Nicholson would cooperate with his demands in order to avoid going to court." *Id.* at 170. He further explained that it was common to wait a few days before seeking a court order for removal "because, after a few days of the children being in foster care, the mother will usually agree to ACS's conditions for their return without the matter ever going to court." *Id.* Although he had no evidence that Ms. Nicholson's children would be subjected to repeated incidents of violence, and even though he did not believe that Ms. Nicholson was neglectful, the caseworker "hoped that 'once she got before the Judge, that the Judge would order her to cooperate with realistic services to protect herself and the two children.'" *Id.* at 171 (quoting testimony). Ms. Nicholson was separated from her children for 21 days and ordered to cooperate with ACS supervision until it eventually dismissed its neglect petition seven months later. *Id.* at 172–173.

Ms. Nicholson's experience was not unique. Although the court held that the ACS policy of presumptively removing children from non-abusive battered mothers was unconstitutional and ordered its discontinuation, *id.* at 251, the case reveals systemic disregard in the child welfare system for the rights of domestic violence victims. The disregard for victims' rights and use of overly aggressive tactics that *Nicholson* so thoroughly documents are not isolated to that case or New York. Rather, similar tactics, which re-victimize battered mothers and their children, are routinely observed by *amici curiae* in myriad subtle and not-so-subtle forms. As *Nicholson*

demonstrates, given the many factors which can cause well-meaning CPS and law enforcement agents to undervalue and infringe victims' rights, Fourth Amendment safeguards are especially important.

II. Given The Risk Of Unreasonable State Intrusions, Victims And Witnesses Of Abuse Are Entitled To Full Fourth Amendment Protection.

A. The Fourth Amendment's Concerns With Preventing Arbitrary Government Intrusions Are Particularly Relevant In Cases Involving Domestic Violence.

Given the potentially severe consequences of state interventions in cases of suspected intra-family violence and the likelihood for state agents to violate constitutional limits, the Fourth Amendment requires safeguards to ensure that searches and seizures are not conducted arbitrarily. The "cardinal principle" of Fourth Amendment jurisprudence is that searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). As the Court explained in setting out the balancing test for assessing the reasonableness of seizures "less intrusive than a traditional arrest":

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reason-

> able expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Brown v. Texas, 443 U.S. 47, 50–51 (1979); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). In this scheme, the probable cause standard "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (citation omitted). Furthermore, the warrant requirement serves a crucial purpose in ensuring that the rights of the individual are not "subject to the discretion of the official in the field." *Camara*, 387 U.S. at 533.

The constitutional imperative to restrain the discretion of agents in the field has particular relevance in cases involving child welfare and domestic violence. As the National Council of Juvenile & Family Court Judges has recognized:

> Because domestic violence encompasses a wide range of behaviors—from the extremely dangerous to the less serious—families require a range of interventions, some of them voluntary and some mandated. To create safety and stability for families requires careful assessment of risk and the capacity to make differential responses.

National Council of Juvenile & Family Court Judges, *supra*, at 24. The Fourth Amendment's requirements for probable cause and review by a judicial officer are critical to ensure that risks are carefully assessed and appropriate responses identified, particularly because pervasive biases and misconceptions are so likely to affect the judgment of CPS and law enforcement agents in these cases.

B. Nothing In The Court's Jurisprudence Suggests That Witnesses And Victims Are Entitled To Less Protection Under The Fourth Amendment.

Had S.G. been suspected of committing a crime, her seizure and custodial interrogation in a room she was not free to leave without valid consent or exigent circumstances would have required a warrant supported by probable cause. *See Florida v. Royer*, 460 U.S. 491, 496 (1983). Yet, because she was suspected of being a victim and a witness, rather than a criminal, petitioners argue that those traditional Fourth Amendment protections did not apply. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530. Indeed,

nothing in this Court's jurisprudence supports the notion that the Fourth Amendment affords innocent victims or witnesses less protection from government intrusion than persons suspected of committing crime.

Petitioners wrongly assert that, under the Court's decision in *Illinois v. Lidster*, 540 U.S. 419 (2004), the Fourth Amendment requirements for a warrant and probable cause have no application when a person who is seized for the purpose of gathering information is not suspected of wrongdoing. (*See* Petr. Alford's Br. 23–25; Petr. Camreta's Br. 19–21.) The Court made no such ruling. In *Lidster*, the Court addressed only the circumstances of the seizure at issue, in which police briefly stopped all motorists passing by the location of the hit-and-run accident. It said nothing about the applicability of individualized suspicion to seizures like the one in this case, in which a particular individual was seized and interrogated for two hours precisely because she was suspected of being an abuse victim.

Moreover, the *Lidster* ruling is inapposite here because, in finding that the traffic stops were constitutional, the *Lidster* Court repeatedly emphasized that they were brief and minimally intrusive. *Lidster*, 540 U.S. at 425–427. In contrast, where the person seized by the state is potentially a victim as well as a witness of abuse, the intrusion on liberty caused by a warrantless, nonconsensual custodial interrogation is vastly greater than the intrusion caused by a brief traffic stop. The degree of intrusiveness is evaluated both objectively—as "measured by the duration of the seizure and the intensity of

the investigation"—and subjectively—in terms of the potential for "generating of concern or even fright." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)); *see also Lidster*, 540 U.S. at 427 (discussing objective and subjective intrusions). On both measures, the seizure of S.G. in this case—and of suspected victims of abuse generally—is highly intrusive. The brief traffic stops at issue in *Lidster* are also distinguishable because, once they ended, the motorists' lives resumed, presumably unaffected by their interaction with the police. In contrast, as occurred with S.G. and her sister (J.A. 65–68, 70–73), the state's seizure and interrogation of a suspected child abuse victim will frequently mark just the beginning of an ongoing intrusion into the individual's life, that may include repeated interviews, physical exams, and placement in foster care.

These intrusions often are not helpful, and they are not benign. As demonstrated in *Nicholson*, CPS's response can be inappropriately drastic and result in negative long-lasting consequences. The harm caused to children when they are needlessly separated from their non-offending parent through placement in foster care cannot be overstated. Further, interrogations of children, and of their battered mothers, may unleash harm to a non-offending parent. Had S.G.'s father been violent, which was not alleged here, the interrogation—without background investigation to first determine whether there was a potential concern of violence—could have triggered violence towards other members of the household, ironically harming rather than protecting children and family members from abuse.

III. Relaxing Fourth Amendment Standards For Child Protection Investigations Will Diminish Fourth Amendment Rights In Domestic Violence Investigations.

Petitioners argue that the custodial interrogation of a suspected child abuse victim without any of the traditional Fourth Amendment requirements—*i.e.*, a warrant, probable cause, parental consent, or exigent circumstances—is reasonable because the state's strong interest in child protection and lack of practical alternatives outweighs the purportedly minimal privacy interests of children in public school. (Ptr. Alford's Br. 36–53; Ptr. Camreta's Br. 10–11, 24–34.) None of petitioners' stated reasons justifies deviating from traditional Fourth Amendment requirements. However, if the Court accepts petitioners' reasoning and creates a lesser standard of Fourth Amendment protection for the seizure of S.G. in this case, it will open the door to diminished Fourth Amendment rights in other circumstances. In particular, the justifications petitioners offer to excuse the seizure of S.G. would logically extend to seizures in other circumstances where children are *not* suspected victims of abuse, but where the state maintains a strong interest in the child, in law enforcement, or in some other social good. For instance, because children who witness domestic violence may be harmed, *see* discussion *supra* Part I.A., there is no rational reason why these proffered justifications would not permit the state to seize and interrogate a child who is not herself abused, but is a witness to violence against a parent. Nor is there a logical limit in petitioners' reasoning to prevent the state from seizing and interrogating an adult victim of domestic vio-

lence in certain circumstances in which her expectations of privacy are reduced.

Petitioners (wrongly) rely on the following purported grounds for a reduced Fourth Amendment standard in this case: (1) the state's strong interest in child protection (Ptr. Alford's Br. 36–39; Ptr. Camreta's Br. 24–26); (2) the difficulty of establishing probable cause where the victim may be the only witness (Ptr. Alford's Br. 41; Ptr. Camreta's Br. 11, 26–28); (3) the impracticality of obtaining a warrant due to the urgent need for protection (Ptr. Alford's Br. 44–46); and (4) reduced privacy expectations of victims (Ptr. Alford's Br. 50–53; Ptr. Camreta's Br. 30–33). Each of these rationales could be applied in cases of domestic violence. However, none of them legitimately justifies reduced Fourth Amendment protections.

With regard to the first rationale, the state's interest in child protection, as already discussed, may be implicated where a child is exposed to domestic violence. *See* discussion *supra* Part I.A. In cases of domestic violence, the state has additional important interests in protecting the adult victim and punishing the offender. *See Georgia v. Randolph*, 547 U.S. 103, 117 (2006) (recognizing that domestic violence is a serious problem). Yet, however compelling the state's interest may be, that alone cannot justify the investigatory seizure of a victim because the seizure is likely to be highly intrusive and damaging, and to actually *disserve* the state's interest.

Likewise, petitioners' argument that a probable cause standard is impractical in cases of suspected child abuse could also be made in situations of do-

mestic violence because both forms of abuse typically occur in private, the victims may be the only witnesses, and they may be reluctant to disclose their abuse. It is true that, for a variety of rational reasons, including fear of increased violence, many victims are reluctant to disclose their abuse. *See supra* note 5. However, petitioners have not established that this reluctance is so pervasive that the probable cause standard is *per se* infeasible. Even if a victim is unwilling to disclose the abuse, it may be possible to obtain probable cause through less intrusive means, such as voluntary interviews of other persons who may have relevant knowledge. Moreover, if a victim is truly unwilling to talk, there is little reason to believe that she will provide reliable information when seized and compelled to endure an interrogation. For these reasons, the difficulty of meeting a probable cause standard in some instances of suspected intra-family abuse cannot justify the erosion of Fourth Amendment rights in all such cases.

Similarly, petitioners' rationale that urgency makes it impractical to obtain a timely warrant could apply equally in domestic violence cases, as in cases of child abuse. *See, e.g., United States v. Brooks*, 367 F.3d 1128, 1136 (9th Cir. 2004) (finding domestic violence situations may present exigent circumstances permitting warrantless police entry); *Tierney v. Davidson*, 133 F.3d 189, 197 (2d Cir. 1998) (same); *State v. Greene*, 162 Ariz. 431, 433, 784 P.2d 257, 259 (Ariz. 1989) (same). However, the possibility that CPS and law enforcement officers may sometimes need to take action for the protection of abuse victims before they have time to obtain a warrant does not justify a departure from traditional Fourth

Amendment requirements in all cases because, where exigent circumstances truly exist, the Fourth Amendment already permits searches and seizures without a warrant. *See Brigham v. Stuart*, 547 U.S. 398, 403 (2006).

Finally, petitioners' argument that the seizure in this case was justified because schoolchildren have reduced expectations of privacy could be extended logically to circumstances in which adult victims of domestic violence subject themselves to diminished privacy rights by seeking help they need. Thus, there is a risk that the petitioners' rationale for allowing warrantless interrogations of children in schools may be used to justify coercive questioning of adult domestic violence victims in certain settings. For example, in some states, domestic violence victims who receive welfare may have reduced expectations of privacy in their own homes. *Wyman v. James*, 400 U.S. 309, 326 (1971) (holding that no Fourth Amendment privacy rights are violated where a state conditions the receipt of welfare benefits on consent to home visits); *Sanchez v. County of San Diego*, 464 F.3d 916, 922–923 (9th Cir. 2006) (same). In addition, Petitioner Camreta argues that statutes requiring public school personnel and certain other persons to report child abuse and neglect diminish children's legitimate expectations of privacy. (Ptr. Camreta's Br. 32–33.) If this premise is accepted by the Court, similar laws in states that require medical personnel to report domestic violence or, more generally, injuries by non-accidental, criminal or violent means, would likewise diminish the privacy expectations of domestic violence victims when they seek treatment for injuries. *See* T. Scalzo,

Reporting Requirements for Competent Adult Victims of Domestic Violence (April 21, 2006), http://www.usmc-mccs.org/famadv/ (follow "Restricted Reporting Resources" hyperlink; then follow "National Domestic Violence Reporting Requirements" hyperlink).

Given all of these parallels, a ruling exempting any form of child welfare investigatory seizure from the warrant and probable cause requirements has potential application in circumstances very different from S.G.'s seizure in this case.

CONCLUSION

In the event that the Court reaches the merits of this case, it should rule that a warrant (or comparable court order) supported by probable cause to believe that a child has been abused, parental consent, or exigent circumstances are required before child protective services or law enforcement agents may seize and interrogate suspected victims of child abuse. Such a rule is necessary to protect suspected victims of intra-family abuse from unreasonable, highly intrusive, and potentially damaging state interventions in their lives.

Respectfully submitted,

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